THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

New Philadelphia Law Requires Reasonable Accommodations for Pregnant Employees

The law in Philadelphia is that it is an unlawful unemployment practice to deny or interfere with an individual's employment opportunities on the basis of pregnancy, childbirth, or a related medical condition. The new bill (Bill No. 130687) signed into law in January extends the prohibition on sex-based discrimination to include "pregnancy, childbirth or a related medical condition within its definition of "sex." Specifically, the law requires employers, upon request, to reasonably accommodate an employee for needs related to pregnancy, childbirth, or a related medical condition. Examples of a reasonable accommodation include, but are not limited to, "restroom breaks, period rest for those whose job requires them to stand for lengthy periods of time, assistance with manual labor, leave for a period of disability in the wake of childbirth, transfer to a vacant position, and job restructuring."

The law allows Philadelphia employers to avoid providing an accommodation to a pregnant employee if doing so will cause an undue hardship. The "undue hardship" factors are similar to those found in the Americans with Disabilities Act. Some considerations in determining whether there is an undue hardship include: the nature and cost of the accommodations; the overall financial resources of the employer's facility; the overall financial resources of the employer, including the size of the employer; and the type of operation or operations of the employer.

Employers may raise as an affirmative defense that the person aggrieved could not, with reasonable accommodations, satisfy the "requisites of the job," a term left undefined by the new law.

NJ Bans Discrimination Based on Pregnancy, Childbirth or Related Medical Conditions

On January 21, 2014, Governor Chris Christie signed into law Bill S-2995/A-4486 granting pregnant women affected by pregnancy protected status under the New Jersey Law Against Discrimination. Although pregnant women were afforded some protection under the LAD where their pregnancy resulted in a disability, the new law extends these protections. The law adds pregnancy to the list of protected classes under the LAD. The protections extend to women during their pregnancy and after.

Under the new law, employers must provide reasonable accommodation to pregnant employees that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth. The following accommodations have been deemed "reasonable": bathroom breaks, periodic rest, assistance with manual labor, job restructuring or modified work schedules. If an accommodation is not feasible, the employer may still be required to provide leave under the Family and Medical Leave Act (FMLA), and/or the New Jersey Family Leave Act (NJFLA).

Employers cannot penalize or retaliate against women affected by pregnancy for requesting or using an agreed-upon accommodation or FMLA-type leave. The statute is clear that any type of retaliation is strictly prohibited. Similar to the new law in Philadelphia, the employer can avoid accommodation if it can establish that doing so would cause an undue hardship.

II. INSURANCE LAW

Misrepresentation on Insurance Application Does Not Bar Coverage

In *DeMarco v. Stoddard*, 2014 N.J. Super. LEXIS 13 (App. Div. January 22, 2014), Thomas DeMarco, a New Jersey resident, was a patient of Dr. Stoddard, a podiatrist practicing in Toms River and Lakewood. From 2007 through 2011, Stoddard was insured by medical-malpractice liability policies issued by the Medical Malpractice Joint Underwriting Association of Rhode Island ("JUA") out of Rhode Island. The JUA provided policies for physicians who could not otherwise get coverage. A doctor who also practiced outside of Rhode Island could be covered if at least 51 percent of his practice was generated in Rhode Island. Stoddard had virtually no Rhode Island practice at all, but in his application, and in subsequent renewals, Stoddard answered "yes" when asked if at least 51 percent of his business was generated in Rhode Island.

Plaintiffs filed a medical malpractice lawsuit against defendant Stoddard regarding foot surgery that Stoddard had performed. Stoddard looked to the JUA for coverage, but the JUA responded that because Stoddard had misrepresented in his insurance application that at least 51% of his practice was in Rhode Island, the JUA would not provide coverage.

The JUA filed a declaratory judgment action in Rhode Island against the DeMarcos and Stoddard claiming that it need not provide coverage. The JUA contended that it justifiably rescinded the malpractice policy it had issued to Dr. Stoddard because the doctor purposely misrepresented the nature and location of his practice. The Rhode Island court entered judgment declaring that the JUA had no obligation to indemnify or defend Stoddard in the New Jersey malpractice case.

Subsequently, the JUA and the DeMarcos filed cross-motions in the New Jersey malpractice case for summary judgment on the coverage question and on the effect of the Rhode Island judgment. The New Jersey court heard argument and granted summary judgment in favor of the DeMarcos. It determined that the Rhode Island judgment was not binding on the DeMarcos and that the JUA was required to indemnify Stoddard in the DeMarcos' lawsuit.

Defendant JUA appealed the judgment entered by the New Jersey Court. The issue was whether a medical-malpractice insurance carrier can rescind a policy so that the carrier has no duty to indemnify the insured doctor for injuries suffered by an innocent third party who made a malpractice claim before the policy was rescinded.

The issue of whether New Jersey or Rhode Island law applied was at the heart of the case. The court noted that both New Jersey and Rhode Island "would restrict the rescission remedy available to insurance carriers in order to provide some protection to innocent third parties for whose benefit compulsory insurance laws were enacted." The court found a comparison between auto insurance and medical malpractice insurance laws, noting that like auto insurance, a New Jersey statute mandates medical malpractice insurance. The court cited New Jersey auto insurance cases, and concluded that "[i]n the same way as the general public uses our roadways, medical patients can reasonably assume New Jersey doctors are complying with the law and carrying compulsory malpractice insurance. Insurance in at least the minimum compulsory amount should remain available for the benefit of innocent patients who suffered injuries when the policy was in effect." The court found that Rhode Island auto cases would support that same result. However, on the issue of compulsory insurance coverage, the laws of the two states are significantly different.

Applying choice of law principles, the court found that New Jersey law applied. The plaintiffs are residents of New Jersey and defendant's medical practice was in New Jersey. In addition, the surgery was performed in New Jersey and the DeMarcos have a strong interest in the application of New Jersey's laws to their claims. Therefore, the court affirmed the ruling of the Law Division on the merits.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.